SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hamade* [2011] QCA 152
PARTIES:	**R** **v** **HAMADE, Said Ahmad** (appellant)
FILE NO/S:	CA No 213 of 2010 DC No 118 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED ON:	1 July 2011
DELIVERED AT:	Brisbane
HEARING DATE:	15 June 2011
JUDGES:	Margaret McMurdo P, Margaret Wilson AJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IRREGULARITIES IN RELATION TO JURY – OTHER CASES – where the appellant was convicted of maintaining a sexual relationship with a child, indecent treatment of a child under 16 years and one count of rape – where a police officer performing court duties communicated with a juror or jurors on one occasion during the judge's summing up – where the communication concerned the possibility of developing the police officer's romantic interest in a member or members of the jury – where the trial judge excluded the police officer from the court room and directed the jury to disregard the communication – whether the communication amounted to a miscarriage of justice because the guilty verdicts may be tainted by a reasonable apprehension of perceived bias on the part of a juror or jurors *Criminal Code* 1899 (Qld), s 668E(1) *Jury Act* 1995 (Qld), s 56 *Candetti Constructions Pty Ltd v Fonteyn* (2010) 108 SASR 429; [2010] SASCFC 63, cited *Cesan v The Queen* (2008) 236 CLR 358; [2008] HCA 52, considered

Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 63, considered
Gately v The Queen (2007) 232 CLR 208; [2007] HCA 55, cited
R v Jackson and Le Gros [1995] 1 Qd R 547; [1994] QCA 46, considered
R v McCosker [2010] QCA 52, cited
R v Phillips [2009] 2 Qd R 263; [2009] QCA 57, considered
R v Szabo [2001] 2 Qd R 214; [2000] QCA 194, considered
Webb v The Queen (1994) 181 CLR 41; [1994] HCA 30, considered

COUNSEL: S L Kissick for the appellant
M J Copley SC for the respondent

SOLICITORS: Hanna Legal for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The appellant was convicted after a nine day jury trial in the Toowoomba District Court on 23 April 2010 of maintaining a sexual relationship with a child (count 1); indecent treatment of a child under 16 years (count 2); and one count of rape (count 3). He was acquitted of two counts of rape (counts 4 and 5) but convicted of the alternative count of unlawful carnal knowledge on count 4. He was not sentenced until 25 June 2010. He was granted an extension of time to appeal in November 2010. His sole ground of appeal is that the jury verdicts should be set aside and a new trial ordered on the basis of a reasonable apprehension of bias on the part of a juror empanelled in the trial.

[2] The appeal arises out of the following episode during the judge's summing up to the jury on the eighth day of the trial. The court resumed in the absence of the jury shortly before 4.00 pm when the following exchange occurred:

> "[DEFENCE COUNSEL]: Your Honour, it has come to my attention-----
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> HER HONOUR: Yes.
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> [DEFENCE COUNSEL]: -----that the police officer looking after the accused has been communicating with one of the members of the jury by sign language. I'm told a sign thus was given by the policeman and the juror in question went three fingers on each hand in response. I'm told by the learned Crown Prosecutor, who I have discussed the matter with, that the policeman knows the juror. It is not proper, in my respectful submission, for a policeman to be communicating with a member of the jury whilst your Honour is addressing them on very important matters. In my respectful submission, the best thing to do would be to say that this matter has come to your Honour's attention, it won't happen any more, and they should listen to what your Honour says rather than being involved in communications by means of sign language with a member of the police force. You saw the accused upset. I saw - I spoke - well, I - well, you might've missed - your Honour had your nose in a book----

> HER HONOUR: Yes.
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> [DEFENCE COUNSEL]: -----and was going flat out - I appreciate that - but I sent my instructing solicitor over to the accused, I went over there and then when your Honour adjourned that matter came to my attention, so all I can do is raise it. I don't want the jury discharged or anything like that, but I just want - I don't know what it was about. The Crown knows perhaps a little bit more than me.
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> …
> HER HONOUR: [Prosecutor], what happened?
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> [PROSECUTOR:] Your Honour, I'm instructed that any communication had absolutely nothing to do with this matter. It's unfortunate that it occurred, but it has absolutely nothing to do with what's happening in this courtroom at the time.
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> HER HONOUR: All right. Well, really the police officer should've known better than that, but I think he'll have to leave the Court now. You'll have to get another police officer to sit in as an orderly.
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> [PROSECUTOR]: Thank you, your Honour.
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> THE JURY RETURNED AT 4.03 P.M.
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> HER HONOUR CONTINUED SUMMING-UP TO THE JURY FROM 4.03 P.M.:
> Ladies and gentlemen, I know it's been a long day and you've been listening carefully, but you'll notice the police officer is no longer here. I understand he made a hand gesture to one of you - I didn't see it and I understand it was nothing to do with the trial - but I'd just reiterate that the summing-up is actually a very important part of the trial and, please, if you can concentrate - there's not much left to do. If you can concentrate as much as you can on the little bit that's left, it will be much appreciated."

[3] Neither counsel requested any further relevant direction.

[4] At the appeal hearing this Court, with the concurrence of both counsel, gave leave to the parties to adduce further evidence.

[5] Mr Abbas Soukie, the law clerk instructing the appellant's counsel at trial, deposed to the following matters in an affidavit sworn on 14 June 2011. He recalled that during the trial the appellant became "visibly upset and crying in the dock".[1] Mr Soukie asked the appellant what was wrong. The appellant told him that "the police officer sitting here is communicating with that lady on the jury". The appellant also told him that the police officer was writing on paper and showing it to the juror. In Mr Soukie's presence, counsel spoke to the police officer about this matter. The police officer responded in words to the effect of, "She was asking me how old I was and I told her. I am interested in her." The police officer said that he signalled to the juror the figure "36". It seems this was the police officer's age. It was also the appellant's age. The police officer had been present in court

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[1] The terms of Mr Soukie's affidavit suggested that the appellant's distress about the contact between the police officer and the juror was throughout the trial, but the appellant's counsel assured the court at the appeal hearing that there was only one contact.

throughout the trial until this point when the judge asked him to leave. Defence counsel did not advise the appellant of his opportunity to apply to discharge the jury nor that, if the jury were discharged, he could apply to be awarded costs of the trial.

[6] The prosecutor at trial deposed to the following matters in an affidavit affirmed 31 May 2011. During the adjournment in the judge's summing up, defence counsel advised her that his client was upset after observing some gesturing type of communication between a member of the jury and the police officer whose role as court orderly throughout the trial had been to sit next to the appellant. The police officer had no role in escorting or in dealing with the jury. The prosecutor did not see the police officer engaging in any type of communication with the jury although defence counsel told her that he was apparently holding up fingers to the jury. The prosecutor approached the police officer and spoke to him. She could not recall the precise words but he told her that "he had been gesturing to a member of the jury, who he knew, in order to make enquiries about the age and the single (or otherwise) status of another member of the jury. He indicated that he had some sort of potential romantic interest in that other member of the jury." The prosecutor passed on that information to defence counsel.

[7] The appellant's counsel submits that, although there are some differences in the two accounts,[2] they make clear that a police officer performing court duties throughout the trial has engaged in "chatting up" a juror. Despite the strength of the prosecution case and the judge's subsequent direction to the jury, the circumstances surrounding this incident would have given a fair minded and informed observer a reasonable apprehension of lack of impartiality on the part of the juror: *Webb v The Queen*.[3] As a result, justice has not been seen to be done. The case against the appellant turned on a police investigation. A uniformed police officer who had been present throughout the trial improperly communicated with a juror or jurors. This created a reasonable apprehension of bias. The community importance of ensuring that trials are conducted properly and without bias requires the granting of the appeal and the ordering of a retrial.

Conclusion

[8] The following matters were common ground at the appeal hearing. Although the appellant was on bail, the uniformed police officer sat next to him throughout the nine day trial until excluded by the judge. The police officer's sole role was that usually fulfilled in metropolitan courts by a corrective services officer. Any communication between a member or members of the jury and the police officer had nothing to do with the merits or otherwise of the case. It concerned the possibility of developing the police officer's romantic interest in a member or members of the jury. The communication was non-verbal and only at the point in the judge's summing-up immediately preceding the extract from the transcript set out in [2] of these reasons. The judge was not asked to and did not ascertain from the juror or jurors or the police officer the precise details of the communication.

[9] The trial transcript records that defence counsel turned his mind to whether he should apply for a discharge of the jury and determined that this was not appropriate. And nor did defence counsel ask the judge to discharge an individual juror or jurors under s 56 *Jury Act* 1995 (Qld). It follows that the appeal can only

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2 The affidavits were dated more than 12 months after the event.

3 (1994) 181 CLR 41, Mason CJ and McHugh J, 53; [1994] HCA 30.

succeed if, under s 668E(1) *Criminal Code* 1899 (Qld), the appellant establishes that this contact between the police officer and a member or members of the jury has amounted to a miscarriage of justice because the guilty verdicts may be tainted by a reasonable apprehension of perceived bias on the part of a juror or jurors. So much is clear from *Webb* and *Ebner v Official Trustee in Bankruptcy*.[4]

[10] In *Webb*, Mason CJ and McHugh J noted that the reasonable apprehension of bias test in respect of a juror in a criminal trial:

> "… allows a margin for error in evaluating the facts as elicited. It concentrates not on whether there is a danger of bias as an objective fact, but whether a fair-minded and informed person might apprehend or suspect that bias existed. … In criminal trials in particular, the jury's function is of great public importance. It is certainly no less important than that of the judge sitting alone in a civil trial, a commissioner determining an industrial dispute or a member of a statutory tribunal inquiring into conduct in an industry which it supervises. The public is entitled to expect that issues tried by juries as well as judges and other public office holders should be decided by a tribunal free of prejudice and without bias. It is true that, unlike the judge and persons exercising quasi-judicial functions, the juror is subject to the directions of a third party – the trial judge. In considering whether a reasonable apprehension of bias exists, it is therefore necessary to consider the likely effect of the judge's directions (if any) as well as the irregularity in question. …
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> It follows that the test to be applied in this country for determining whether an irregular incident involving a juror warrants or warranted the discharge of the juror or, in some cases, the jury is whether the incident is such that, notwithstanding the proposed or actual warning of the trial judge, it gives rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the juror or jury has not discharged or will not discharge its task impartially."[5]

[11] In *Ebner*, Gleeson CJ, McHugh, Gummow and Hayne JJ relevantly noted:

> "Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver … or necessity … , a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle.
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> The apprehension of bias principle may be thought to find its justification in the importance of the basic principle, that the tribunal

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4 (2000) 205 CLR 337; [2000] HCA 63.

5 (1994) 181 CLR 41, 52-53.

> be independent and impartial. So important is the principle that even the appearance of departure from it is prohibited lest the integrity of the judicial system be undermined. There are, however, some other aspects of the apprehension of bias principle which should be recognised. Deciding whether a judicial officer (or juror) *might* not bring an impartial mind to the resolution of a question that has not been determined requires no prediction about how the judge or juror will in fact approach the matter. The question is one of possibility (real and not remote), not probability. Similarly, if the matter has already been decided, the test is one which requires no conclusion about what factors *actually* influenced the outcome. No attempt need be made to inquire into the actual thought processes of the judge or juror.
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> The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed."[6]

[12] This Court in *R v Phillips*[7] considered the effect of the gesture and silent mouthing by the judge's associate of words expressing approval of the prosecutor's address to the jury in a criminal trial. Holmes JA, with whom White AJA agreed, ultimately determined there had been no miscarriage of justice but expressed the question in that case as:

> "whether a fair-minded observer would hold a reasonable suspicion that the appellant was deprived of a fair trial by reason of what happened; and the trial would be rendered unfair if the jurors' impartiality were impaired by reason of the associate's conduct."[8]

[13] In *R v Szabo*,[9] this Court concluded that the close personal relationship between defence counsel and prosecutor at trial, which was not disclosed to the appellant, deprived him of an opportunity to engage different trial counsel. This had the result that "an ordinary fair-minded citizen in the position of the appellant with knowledge of all relevant circumstances would have at least a lingering suspicion that the appellant did not have the benefit of fair play."[10]

[14] In *R v Jackson and Le Gros*,[11] after the jury retired to consider their verdicts, communications passed between the court bailiff and the jury foreman concerning

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6 (2000) 205 CLR 337, 344-345.
7 [2009] 2 Qd R 263; [2009] QCA 57.
8 Above, 268.
9 [2001] 2 Qd R 214; [2000] QCA 194.
10 Above, 233-234.
11 [1995] 1 Qd R 547; [1994] QCA 46.

sentencing principles and the acceptability of a deadlocked jury. The resulting guilty verdicts were set aside.

[15] Every juror has a constitutional obligation to decide the case impartially on its factual and legal merits. Put at its strongest for the appellant, the present question is whether a fair minded observer would hold a reasonable suspicion that the juror or jurors who communicated with the police officer might have reached their verdicts influenced by that contact and resulting sympathy with a prosecution case prepared by other police officers.

[16] The conduct of the police officer was immature and reprehensible. It showed a complete lack of insight into the solemnity of a criminal trial, particularly on such serious counts. It insulted all concerned in the trial process from the appellant to the victim, as well as the judge, jurors, counsel and witnesses. As this appeal demonstrates, it put at risk the integrity of a costly nine day jury trial which was no doubt a traumatic experience for both complainant and appellant. Counsel for the respondent to this appeal undertook to request the Queensland Director of Public Prosecutions to liaise with the appropriate senior member of the Queensland Police Service to ensure the police officer is counselled and fully understands the serious implications of his inappropriate conduct.

[17] It is important to note that at the beginning of the trial the judge told the jurors that if they had heard anything about the case they must put it out of their minds because the appellant:

> "has a right to hear the allegations and test the allegations, and know what the verdict's being decided on. So it's important for you to act only on the evidence that you hear in Court. The other reason for it is if you have heard anything outside the Court, it's going to be secondhand evidence and 99.9 per cent of the time that's not accurate evidence. So, as I say, it's very important to decide the verdict on the evidence, and only on the evidence."

[18] When the jury left the court room on the first day of the trial, the judge gave them this instruction:

> "HER HONOUR: Not that you really know anything about the case yet, but the warning that we give our jurors always is please don't talk to family and friends about the case. As I say, you really probably don't know much about the case at this stage, but particularly once you've heard evidence.
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> The important opinion is the opinion of the 12 of you. When you start talking to people who aren't involved in criminal proceedings, they usually have an opinion whether they know anything or not, and we really don't want any of you influenced by the opinion of your family and friends. So, please, don't say anything to them.
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> The other thing I had to tell you - I'm obliged to tell you is it's an offence under the Jury Act to make independent investigations into an accused person. So I'm sure you've got better things to do with your time than do that, but if you feel the desire, please don't, because if something like that happens we simply have to declare a mistrial and start again, so it's a huge waste of public money for a start.

> So - yes, if you can just refrain from making any inquiries one way or the other, and we'll see you tomorrow morning."

[19] The judge's directions to the jury in the summing up included:

> "My task is to ensure the trial is conducted according to law. As part of that, I will direct you on the law that you need to know to apply in this case. You must accept the law from me and apply all directions I give you on matters of law. You are to determine the facts of the case, based on the evidence that's been placed before you in the courtroom. That involves deciding what evidence you accept. You then apply the law as I explain it to you to the facts as you find them to be, and in that way arrive at your verdicts.
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> …
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> You must reach your verdict on the evidence and only on the evidence. The evidence is what the witnesses have said from the witness box, and the recordings of the evidence that you've heard … . And the other things received as exhibits, such as the documents, photographs and the video recording on the phone, text messages, that sort of thing. …
>
> If you've heard or read or otherwise learnt anything about this case outside the courtroom, you need to exclude that information from your consideration. Please have regard only to the testimony and the exhibits put before you in the courtroom since the trial began. Please ensure no external influence plays a part in your deliberations."

[20] Those directions made abundantly clear to the jury that they must reach their verdict only on the evidence. There is no reason to think the jury did not conscientiously follow those directions.

[21] Immediately after the concerning conduct of the police officer, the judge excluded him from the court room, raised the matter with the jury and stated that she understood the contact had nothing to do with the trial. No member of the jury indicated anything to gainsay her Honour's statement. The appellant does not now contend otherwise.

[22] The police officer's communications with the juror or jurors did not concern the merits of the trial or even, as in *Jackson and Le Gros*, the procedural aspects of it. Nor did the episode raise concerns about the impartiality of the appellant's legal representation as in *Szabo*. The police officer was the appellant's court room guard during the trial. His role was not closely linked to that of the prosecutor or, by contrast with *Phillips* (where the majority refused the appeal in any case), that of the judge.

[23] In light of the trial judge's careful and proper directions throughout the trial and her Honour's immediate and appropriate response to this matter, I am confident that a fair minded and informed member of the public would not reasonably apprehend that, because of the contact between a juror or jurors and the police officer, the juror or jurors might disregard the judge's comprehensive directions and, without important regard to the evidence and the law, find in favour of the prosecution. It follows that in my view the appellant has not demonstrated that the guilty verdicts amount to a miscarriage of justice. I note that *Ebner* emphasises that the question of

apprehended bias is one of possibility only and requires no conclusion about what factors actually influenced the outcome or the jurors' thought processes in reaching that outcome.[12] Nonetheless, I am comforted in concluding there has been no miscarriage of justice in this case by the fact that the jury's verdicts were discerning and do not suggest they blindly adopted the prosecution or police case irrespective of the evidence and the judge's directions on the law.

[24] It is therefore not necessary to determine whether any waiver of the appellant's rights may have resulted from defence counsel's statement to the judge that he was not asking for a mistrial, in circumstances where he had not taken instructions from the appellant on that issue: cf *R v McCosker*;[13] *Candetti Constructions Pty Ltd v Fonteyn*.[14] See also *Gately v The Queen*.[15]

[25] There is another concern raised by these events although not directly adverted to in the appellant's ground of appeal. That is whether the police officer's conduct amounted to such a distraction of a juror or jurors that they may not have attended to the judge's directions and a miscarriage of justice occurred. The trial transcript set out at [2] of these reasons suggests that defence counsel and the judge were alive to this concern. In *Cesan v The Queen*,[16] the trial judge repeatedly fell asleep during Cesan's criminal trial, causing some members of the jury to be distracted. Hayne, Crennan and Kiefel JJ noted that:

> "[I]n considering whether there was a miscarriage of justice at the trial, attention must focus upon the respect or respects in which it is said that there was some departure from the proper conduct of the trial, rather than upon the cause of the departure. That is why, in the present cases, to focus only upon the fact that the trial judge fell asleep during some parts of the trial diverts attention from identifying whether there was some miscarriage."[17]

[26] Unlike in *Cesan*, there were not constant distractions of this type during the trial. The judge's prompt directions after the single distracting episode fully dealt with the concerns of the appellant's counsel. The judge told the jury that her summing up was important and to focus on it. I am confident there has been no miscarriage of justice arising from this unfortunate distraction.

[27] It follows that the appeal against conviction must be dismissed.

[28] **MARGARET WILSON AJA:** The appeal should be dismissed for the reasons given by the President.

[29] **MULLINS J:** I agree with McMurdo P.

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12 (2000) 205 CLR 337, 345. Set out at [11] of these reasons.
13 [2010] QCA 52, [3] and [95].
14 [2010] SASCFC 63, [45]-[57].
15 (2007) 232 CLR 208, Hayne J at 232-233; Gleeson CJ, Heydon and Hayne JJ agreeing; [2007] HCA 55.
16 (2008) 236 CLR 358; [2008] HCA 52.
17 Above, 393.